United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 13-1730**
	)	**Issued: January 13, 2014**
DEPARTMENT OF VETERANS AFFAIRS, CONNECTICUT HEALTHCARE SYSTEM, West Haven, CT, Employer	)	

Appearances:
David J. Morrisey, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2013 appellant, through his attorney, filed a timely appeal from the May 1, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on November 9, 2011.

FACTUAL HISTORY

On December 15, 2011 appellant, then a 49-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging injury to his left upper leg, hip and buttock area at 7:00 a.m.

[1] 5 U.S.C. § 8101 *et seq.*

on November 9, 2011. He went to his personal vehicle to retrieve a cellphone, when his left leg slipped and twisted from the wet sidestep of his vehicle onto a grass area. Appellant's regular work hours are 7:00 a.m. through 3:30 p.m. The employing establishment controverted his claim, stating that it had not been filed within 30 days and he was not in the performance of duty because the incident occurred when he was at a personal vehicle.

By letter dated December 27, 2011, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It afforded him 30 days to submit this additional evidence. OWCP also requested that the employing establishment address appellant's duties and the facts surrounding his condition.

By letter dated January 3, 2012, the employing establishment stated that appellant was not allowed to go to his car to get his cellphone. Appellant left his car and, prior to reporting for work, returned to retrieve his cellphone. The employing establishment noted that he did not need his cellphone while working. While the parking facilities were owned, controlled or managed by the employing establishment, appellant was not required to park in this lot.

By letter dated January 5, 2012, appellant stated that he notified Sargent Lucuk of the incident on the date of injury. He asserted that he was allowed to go to his car to retrieve his cellphone as it was the only form of communication he had at the time as a new police officer and that he had not yet been issued a radio or other means of communication. Appellant noted that he needed his cellphone while working because it was the only form of communication he had while traveling to areas of the employing establishment campus, but that he was not required to have the cellphone. He explained that he waited over 30 days to file a claim because he was out of work after surgery for a period of 31 days and because as a new employee, he was unsure of the process for filing a claim. Appellant stated that he did not sustain any other injury between November 9, 2011 and the date the incident was first reported to a supervisor or physician and that he did not have any similar disabilities or symptoms before that date. He asserted that he was on agency premises performing the regularly assigned duty of reporting for work when the injury occurred and that the parking lot where the injury occurred was owned, controlled and managed by the employing establishment. Appellant noted that the lot where he was parked was designated as parking for police officers, but that there were other lots on the premises where he could have parked. He stated that he was on his way to work in the morning and only a short distance away from his vehicle when he realized that he had forgotten his cellphone and returned to his vehicle to search for it.

By letter dated January 17, 2012, OWCP requested that the employing establishment review appellant's statement and note any points of disagreement. It stated that, in the absence of a full reply, it may accept his allegations as factual.

In progress notes dated November 9, 2011, Dr. Amir Mohammed, Board-certified in internal medicine, stated that appellant had an acute lower extremity strain. He noted that appellant was a recently hired police officer who was reporting to work and that he twisted his left leg in the employing establishment parking lot while stepping out of his personal truck. Dr. Mohammed reported that appellant denied previous harm or injury and that he had pain in the lower buttock region radiating to the upper thigh. He asserted that the injury was not related to duties of appellant's job and that the causal relationship between his duties and the condition

was unclear at the time, but wrote that the physical findings could possibly be related to the alleged incident. Dr. Mohammed recommended a work restriction until November 14, 2011 and noted that appellant had returned to work.

In a report from January 9, 2012, Dr. Ahmed Khan, a Board-certified neurosurgeon, stated that appellant slipped and fell while exiting his vehicle in the parking lot at work and immediately had left leg pain, which was seen by another physician at the employing establishment. Within four days the pain was worse and appellant was diagnosed with a herniated disc in his lumbar spine and, due to intractable pain, underwent surgery with Dr. Khan. He had been seen twice in postoperation visits and, having completed physical therapy, was experiencing only occasional discomfort in his back. Dr. Khan cleared appellant for full duty with no restrictions.

In a leave analysis dated February 3, 2012, appellant was reported to have worked full days on November 9 and 10, 2011 and that his scheduled tour of duty for November 9, 2011 was 8:00 a.m. through 4:30 p.m.

By electronic message dated February 2, 2012, OWCP requested that appellant's employer respond to its inquiries regarding appellant's issuance of a radio and whether he was instructed to carry his personal cellphone while in the performance of duty. On the same date, the employing establishment responded to OWCP's inquiries, stating that, because he was in an administrative role for police services, there was no requirement for immediate contact with him and that, although he was assigned a radio, he was not required to carry it. It also stated that appellant was not instructed to carry his cellphone while traveling on the employing establishment campus, because he had not been assigned any police duties other than reporting in to complete training items, which did not require remote communication with other officers.

By letter dated January 24, 2012, the employing establishment noted its points of disagreement with appellant's allegations. It stated that, as he had arrived at work and not left the parking lot before he was injured and had not entered the building to report for duty hours, he was not in the performance of duty at the time of the incident. The employing establishment asserted that appellant was in a role that required no immediate contact and was not instructed to carry his cellphone on the employing establishment campus and that he had been assigned a radio, but he was not required to carry it. It noted that he had not been assigned any police duties other than reporting in to work to complete training items. The employing establishment also noted that, contrary to appellant's assertion that he had not been able to file a claim within 30 days because he was absent from work due to injury, he worked the entire days of November 9 and 10, 2011, went off duty and did not return until December 12, 2011.

By decision dated February 6, 2012, OWCP denied appellant's claim, finding that the evidence was not sufficient to establish that his injury arose during the course of employment and within the scope of compensable work factors. It noted that he had also not submitted sufficient medical evidence to establish a causal relationship between identified work factors and his condition.

On January 31, 2013 appellant requested reconsideration of OWCP's February 6, 2012 decision.

In physical therapy notes dated January 5, 2012, a physical therapist stated that appellant's condition had resolved. Appellant continued to submit medical evidence including physical therapy notes and progress notes from Dr. Craig Bogdanski, an osteopathic physician.

By letter dated April 12, 2013, OWCP requested that the employing establishment review appellant's application for reconsideration and submit any comments within 20 days.

By letter dated April 22, 2013, the employing establishment stated that appellant's CA-1 form indicated that the incident occurred one hour before the start of his tour, that he injured his left upper leg, hip and buttock when his left leg slipped and twisted off the wet sidestep of his vehicle and that he was not in the performance of duty. It asserted that Dr. Mohammed's report stated that the condition was not work related and that appellant had not provided the employing establishment with the medical evaluation notes from Dr. Bogdanski. The employing establishment noted that appellant worked full shifts on November 9 and 10, 2011 and that he stated that he woke up on November 12, 2011 with excruciating pain and a herniated disc of the lumbar spine.

In an addendum to its letter dated April 22, 2013, the employing establishment sent a letter dated April 23, 2013. It explained that while appellant's CA-1 form stated his work hours as 7:00 a.m. to 3:30 p.m., Monday through Friday, appellant's time cards indicated that his work hours were 8:00 a.m. to 4:30 p.m.

By decision dated May 1, 2013, OWCP reviewed the merits of appellant's claim and declined to modify its decision of February 6, 2012. It found that he had not established that his claimed injury occurred within the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase

[2] 5 U.S.C. §§ 8101-8193.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 5 U.S.C. § 8102(a).

sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.[6] The phrase in the course of employment is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[7]

The Board has accepted the general rule of workers' compensation law that an injury sustained by an employee having fixed hours and place of work while going to or coming from work, before or after working hours, is generally not compensable because it does not occur in the performance of duty. However, exceptions to the rule have been declared by courts and workers' compensation agencies. One such exception, almost universally recognized, is the premises rule: an employee driving to or coming from work is covered under workers' compensation while on the premises of the employing establishment. As to what constitutes the premises of the employing establishment, the Board has stated that the term premises is not synonymous with property. The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases premises may include all the property owned by the employing establishment; in other cases, even though the employing establishment does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.[8]

The Board has pointed out that factors which determine whether a parking area used by employees may be considered a part of the employing establishment's premises include whether the employer contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employer to its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot and whether other parking was available to the employees. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the premises of the employer. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employing establishment owned, maintained or controlled the parking facility, used the facility with the owner's special permission or provided parking for its employees.[9]

Coverage under this exception has been denied in a number of cases when the employee was engaged in a personal action that did not substantially benefit the employer rather than performing a work duty or some action incidental thereto. For example, in *J.B.*, coverage was

[6] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[7] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[8] *See Roma A. Mortenson-Kindschi*, 57 ECAB 418, 424 (2006); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[9] *See Diane Bensmiller*, 48 ECAB 675, 678 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500, 504-05 (1991); *Edythe Erdman*, 36 ECAB 597, 599 (1985).

denied when the employee was injured while going to her car in order to retrieve her personal cellphone.[10]

ANALYSIS

On December 15, 2011 appellant filed a traumatic injury claim alleging that he sustained injury to his left upper leg, hip and buttock area at 7:00 a.m. on November 9, 2011. He went to his personal vehicle to retrieve a cellphone and his left leg slipped and twisted on the wet sidestep of the vehicle, landing on a grassy area. By letter dated January 5, 2012, appellant asserted that he was allowed to go to his car to retrieve his cellphone as it was the only form of communication he had at the time as a new police officer and that he had not yet been issued a radio or other means of communication. He noted that he needed his cellphone while working because it was the only form of communication he had while traveling to areas of the employing establishment campus, but that he was not required to have the cellphone. Appellant stated that he was on agency premises performing the regularly assigned duty of reporting for work when the injury occurred and that the parking lot where the injury occurred was owned, controlled and managed by the employing establishment. He explained that the lot where he was parked was designated as parking for police officers, but that there were other lots on the premises where he could have parked. Appellant stated that he was on his way to work in the morning and only a short distance away from his vehicle when he realized that he had forgotten his cellphone and returned to his vehicle to search for it.

By letter dated January 3, 2012, the employing establishment stated that appellant was not allowed to go to his car to get his cellphone, asserting that he left his car and, prior to reporting for work, reached back in to get it. It asserted that he did not need his cellphone while working. The employing establishment also noted that, while the parking facilities were owned, controlled or managed by them, appellant was not required to park in this lot.

The Board finds that the January 9, 2011 incident did not arise in the performance of duty. The employing establishment noted that it owned, controlled or managed the parking lot in its letter of January 3, 2012. This factor alone, however, is not sufficient to establish entitlement to benefits as the concomitant requirement of an injury arising out of employment must be shown. This encompasses not only the work setting but also that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts must show establish that the injury occurred within a reasonable time interval of work and that a substantial employer benefit was derived or a work requirement gave rise to the injury.[11] While the November 9, 2011 incident occurred on the premises of the employing establishment, the incident did not occur during his scheduled work hours nor was he injured while performing any duties in connection with his employment as a police officer. Rather, appellant was on a

[10] *See also C.K.*, Docket No. 12-1347 (issued January 17, 2013) (finding that although appellant was on the premises of the employing establishment at the time of the incident, coverage was denied because he was not injured during scheduled work hours or in the course of performing duties in connection with his employment). *J.B.*, Docket No. 11-106 (issued August 17, 2011).

[11] *See F.H.*, Docket No. 11-738 (issued November 8, 2011); *Howard M. Faverman*, 57 ECAB 151, 155 (2005).

personal mission to retrieve a personal item from his automobile outside of scheduled work hours.

The claim form noted that appellant's regularly scheduled hours were from 7:00 a.m. through 3:30 p.m.; however, a leave analysis dated February 3, 2012 revealed that his scheduled tour of duty for November 9, 2011 was from 8:00 a.m. through 4:30 p.m. and this period of time was his regularly scheduled tour. There is no evidence of record to establish that his employer requested or required him to arrive outside of his regularly scheduled tour of duty.

The Board finds that, at the time of the injury, appellant was on the employing establishment premises but the injury occurred approximately one hour before the start of his regular shift. What constitutes a reasonable interval of time to arrive at or remain on the premises of the employing establishment for reasons related to work depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the employment activity.[12] The record reveals that appellant was not required to be at work prior to 8:00 a.m. on November 9, 2011. There is no evidence that he was required by the employing establishment to be on the premises prior to his official hours in order to prepare for any daily work activities. Further, appellant was not performing employment duties at the time of the incident.[13]

By letter dated January 24, 2012, the employing establishment noted that appellant's position required no immediate contact nor was he instructed to carry his cellphone while on the campus. Appellant was provided a radio, but he was not required to carry it. He had not been assigned any police duties other than to report to work to complete training items. The evidence reflects that retrieving appellant's cellphone was a requirement of his employment. Appellant was not on the premises at that time of injury for any reason related to his employment duties nor did his employer derive any substantial benefit from the activity giving rise to his injury. The retrieval of his personal cellphone from his automobile an hour before he was required to be on duty benefited him not his employer. The incident did not occur while appellant was reasonably fulfilling the duties of his employment.

The act of retrieving a cellphone not required as part of his employment, was a personal mission unrelated to his employment. This act cannot be likened to incidental acts such as using a toilet facility, drinking coffee or similar beverages, eating a snack during recognized hours or taking a smoking break, which are acts recognized as personal ministrations that do not take the employee out of the course of employment.[14] Appellant was not scheduled to be at work until

[12] *F.H., id.*

[13] *See William W. Knispel*, 56 ECAB 639, 643 (2005); *Compare John F. Castro*, Docket No. 03-1653 (issued May 14, 2004) with *George E. Franks*, 52 ECAB 474, 475 (2001); *Venicee Howell*, 48 ECAB 414, 416 (1997); *Arthur A. Reid*, 44 ECAB 979, 984 (1993); *Nona J. Noel*, 36 ECAB 329, 331 (1984). In cases concerning what constitutes a reasonable interval before or after work, the Board has addressed the activities engaged in by the employees before or after work. In *Howell*, the Board found coverage when the employee was injured five minutes after work while performing the incidental task of submitting a job bid. In *Noel*, the Board denied coverage when the employee was injured 90 minutes before work while engaging in the personal activity of eating breakfast.

[14] *See J.B., supra* note 10. *See also Roma A. Mortenson-Kindschi*, 57 ECAB 418 at 424 (2006); *Lee R. Haywood*, 48 ECAB 145, 146 (1996).

one hour after the incident occurred. The retrieval of his cellphone from his personal vehicle was not an activity necessary for personal comfort or ministration connected to his employment. Therefore, appellant's act was not incidental to his employment and the condition resulting from that act did not occur in the performance of duty.

On appeal, appellant's counsel argued that the search and retrieval of appellant's cellphone from his personal vehicle should fall under the heading of a personal ministration, incidental to employment, that did not take appellant out of the performance of duty. For the reasons stated above, appellant was not in the course of employment at the time of the incident on November 9, 2011.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on November 9, 2011. Therefore, appellant has failed to meet his burden of proof to establish a claim for compensation.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board